Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILBANKS SECURITIES, INC.

Petitioner,

vs.

DONALD R. MCFARLAND,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are procedural due process requirements under the 14th Amendment applicable to a statutorily authorized challenge of an arbitration award in state court?

Does a State violate procedural due process requirements when a Judge converts a dispositive motion into a different kind of dispositive motion, and then immediately rules without advance notice or any opportunity to respond?

LIST OF PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The list of all parties to the proceeding in the Court below is as set forth in the caption. Wilbanks Securities, Inc., has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

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The Order of the Oklahoma Supreme Court denying Petition for Writ of Certiorari is unpublished, and is reproduced in the appendix to this Petition for Writ of Certiorari ("A") at A-1. The Order of the Oklahoma Court of Appeals denying Petition for Rehearing is unpublished, and is reproduced at A-39. The Oklahoma Court of Civil Appeals opinion affirming the district court is released for publication, citation currently is __ P.3d __, and is reproduced at A-2 to A-27. The district court's Judgment denying the Petitioner's motion for new trial is unpublished, and is reproduced at A-28 to A-32. The district court's Order converting Respondent's Motion for Summary Judgment into a Motion to Confirm the Arbitration Award, and sustaining same, is unpublished, and is reproduced at A-33 to A-35.

JURISDICTION

The Petition for Writ of Certiorari in the Oklahoma Supreme Court was denied on February 8, 2010. The underlying Oklahoma Court of Civil Appeals opinion was entered October 8, 2009. The Petition for Writ of Certiorari to the United States Supreme Court was filed on May 10, 2010. The Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, Section One, provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Wilbanks Securities, Inc., ("Wilbanks"), is an Oklahoma Corporation engaged in the financial investment industry as a registered broker dealer and member of the National Association of Securities Dealers ("NASD"). Donald R. McFarland ("McFarland") is a licensed insurance agent and "Series 6" registered securities representative who worked as an independent contractor for Wilbanks, until his termination.

On November 24, 2004, Wilbanks filed an NASD arbitration claim against its former agent McFarland, asserting claims of breach of contract, breach of the duty of good faith, "selling away," tortious interference with business, and common law fraud. McFarland responded by asserting counterclaims for defamation, wrongful confiscation of commissions and wrongful imposition of a $20,000 fine. Based upon the evidence allowed in the

arbitration, the arbitration panel denied Wilbanks' claims and found it liable to McFarland for withheld commissions, future renewals, a $20,000 fine imposed against McFarland, together with costs and attorney's fees. The Arbitration award was entered on May 18, 2006.

On June 16, 2006, Wilbanks timely filed a Petition to Vacate or Modify Arbitration Award in the Oklahoma County District Court, State of Oklahoma. Vacating an arbitration award is a valid action and remedy under Oklahoma's Uniform Arbitration Act, 12 O.S. § 1874, or under the United States Arbitration Act, 9 U.S.C. § 10. *See* A-64 to A-66.

On June 1, 2007, McFarland filed his Motion for Summary Judgment. In order to better respond to the Motion for Summary Judgment, Wilbanks sought to take several depositions, but such effort was denied by the district court. Thereafter, on September 28, 2007, Wilbanks timely filed its Response to the Motion for Summary Judgment. Wilbanks argued, in part, that McFarland's Motion was improper because it did not set forth any "Statement of Material Facts" or otherwise cite supporting evidence as required by Rule 13, Oklahoma Rules for District Courts.

McFarland's Motion for Summary Judgment was set for hearing on October 26, 2007. At the hearing, the district court announced that it had read the parties' filings, that it would not accept further oral argument and that the district court

was prepared to rule. *See* A-67 to A-71. In its ruling, the court stated as follows:

> THE COURT: The Court finds that ---- I am going to consider the Defendant's Motion for Summary Judgment, in essence, [as] Defendant's Motion to Confirm Arbitration Award. That motion is hereby sustained. Defendant will prepare the appropriate order, present it to me within ten days. I think that addresses all the issues presented to the Court here today. Anything else I need to address, Mr. Heggy?
>
> MR. HEGGY: Not on behalf of the Defendant.
>
> THE COURT: Ms. McAmis?
>
> MS. MCAMIS: Just for purposes of the record, please note our exception.

Wilbanks timely sought a new trial in the district court, asserting that "minimum due process required that the Court should have, at the least, given the Plaintiff notice of her intentions and an opportunity to either respond to the newly converted motion orally and/or in writing." The district court denied the motion for new trial without explanation on December 13, 2007. *See* A-28 to A-32. The district court's rulings were timely appealed by filing a Petition in Error with the Oklahoma Supreme Court on January 11, 2008. The case was assigned

to the Oklahoma Court of Civil Appeals, Division II. Wilbanks' appellate Brief in Chief was filed on August 29, 2008. Therein Wilbanks argued, in part, that the district court had denied Wilbanks its procedural due process under the 14th Amendment of the United States Constitution by denying it notice and reasonable opportunity to be heard when the district court converted the nature of McFarland's dispositive motion, just prior to its ruling.

On October 8, 2009 the Oklahoma Court of Civil Appeals affirmed the judgment of the district court. *See* A-2 to A-27. The Oklahoma Court of Civil Appeals found that the "assertions of error give rise to the question of what due process is due when an arbitration award is challenged . . . " in state court. *See* A-11. Ultimately, the Oklahoma Court of Civil Appeals held that "one is not entitled to the same procedural due process" rights as the typical litigant when they bring a statutorily authorized challenge to an arbitration award. *See* A-14, Opinion of October 8, 2009, Par. 21 (a statutorily authorized challenge to an arbitration award ". . . is not entitled to the same procedural due process that a [12 O.S.] Sec. 2003 petition would receive.")

Wilbanks timely filed a Petition for Rehearing on October 28, 2009, which was denied on November 17, 2009. *See* A-53 to A-63; A-39. On December 7, 2009, Wilbanks timely filed a Petition for Writ of Certiorari in the Oklahoma Supreme Court. The Petition for Writ of Certiorari was denied on February 8, 2010. *See* A-40 to A-52; A-1. Both on Rehearing, and in the Petition for Writ of Certiorari

to the Oklahoma Supreme Court, Wilbanks asserted that "procedural due process" is a Constitutional requirement in all state court proceedings where a person's life, liberty or property is at stake. Wilbanks asserted that to deny minimum procedural due process in a statutorily authorized challenge of an arbitration award would be in violation of the United States Constitution's 14th Amendment and the Constitution's "supremacy clause."

REASONS FOR GRANTING A WRIT OF CERTIORARI

This case presents an important issue of first impression; whether minimum procedural due process is owed in a statutorily authorized challenge of an arbitration award in state court? The Oklahoma courts have determined that minimum procedural due process is not owed in an arbitration appeal because of the nature of arbitration and the deference given to them by courts. Citing one Seventh Circuit case, which in fact focused on the applicability of the Federal Rules of Civil Procedure, the Oklahoma appellate court concluded that *if* procedural due process was required in a post-arbitration challenge, "... the ostensible purpose for the resort to arbitration, i.e., avoidance of litigation, would be frustrated." *See* A15 to A-16, Opinion of October 8, 2009, Par. 24. Respectfully, Wilbanks asserts that the Oklahoma courts have incorrectly decided an important issue of federal law that has not been, but should be, settled by the United Supreme Court.

The United States Constitution generally requires notice and a reasonable opportunity to be heard in instances where a person's established life, liberty or property interest is at risk by State action. While the Oklahoma courts have now carved out an exception for even minimum procedural due process in challenges to arbitration awards, the United States Supreme Court has never done so. It is significant that here, the Oklahoma Legislature saw fit to allow limited challenges to arbitration awards to be filed in state court. Nothing in the Oklahoma statute purports to limit the "procedural due process" rights to be afforded one who brings a statutorily authorized challenge. *See* A-64 to A-67. Moreover, nothing in the United States Constitution makes 14th Amendment minimum procedural due process protections inapplicable or diminished in the context of a state court challenge to an arbitration award.

As the United States Supreme Court stated in *Mathews v. Eldridge*, 424 U.S. 319, 332-335, (1976), procedural due process imposes constraints on government decisions which deprive persons of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.*, *citing Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Balancing the interests of the parties and the State, it is clear that Wilbanks interest was substantial, while the State's interest in an immediate summary adjudication without notice or response, was

slight. Further, without allowing a response by Wilbanks the risk of an erroneous deprivation of its interest is great.

"Property" includes rights, claims or remedies allowed by state law, even in circumstances where a state need not have created such right. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430; 102 S. Ct. 1148; 71 L.Ed.2d 265 (1982). The requirement of minimum due process has been recognized in all sorts of cases and contexts, to include: (1) proceedings to terminate welfare benefits [*Goldberg v. Kelly*, 397 U.S. 254, 262-264 (1970)]; (2) proceedings to suspend driver's licenses [*Bell v. Burnson*, 402 U.S. 535, 539 (1971)]; (3) proceedings for ex parte prejudgment replevin [*Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972)]; (4) proceedings to determine violations of a conditional parole [*Morrissey v. Brewer*, 408 U.S. 471, 481-484 (1972); (5) proceedings to revoke probation [*Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973)]; (6) proceedings for termination of employment [*Arnett v. Kennedy*, 416 U.S. 134, 154-157 (1974)]; (7) proceedings for forfeiture of state-created good-behavior jail credits [*Wolfe v. McDonnell*, 418 U.S. 539, 557-558 (1974)]; (8) proceedings for a temporary suspension from public school [*Goss v. Lopez*, 419 U.S. 565, 572-574 (1975)]; (9) proceedings for cutting off utility services [*Memphis Light & Gas v. Craft*, 436 U.S. 1, 18-19 (1978)]; (10) proceedings for involuntary transfer to a mental hospital [*Vitek v. Jones*, 445 U.S. 480, 487-489 (1980)].

More recently, the Court has addressed the requirements of minimum procedural due process in

Gary Jones v. Linda Flowers, 547 U.S. 220, 238-239; 126 S.Ct. 1708; 164 L.Ed.2d 415 (2006), where the Court found the State's notice of a tax sale failed to meet minimum due process requirements. This Court has not addressed whether a statutorily allowed challenge of an arbitration award is a property interest, for which a party must be afforded minimum due process. Further, this Court has not addressed what procedural due process is owed when a court sua sponte converts a dispositive motion into a different kind of dispositive motion.

In the context of summary adjudications of legal claims, the Courts have widely recognized that advance notice and a reasonable opportunity to respond (often a minimum of ten days) is a fundamental and mandatory requirement. *See Federal Refinance Co. v. Klock*, 352 F.3d 16, 32 (1st Cir. 2003); *Whiting v. Maiolini*, 921 F.2d 5, 7 (1st Cir, 1990); *U.S. v. One Colt Python .357 Cal. Revolver*, 845 F.2d 287, 289 (11th Cir. 1988); *Western Fire Inc. Co., v. Copeland*, 786 F.2d 649, 653 (5th Cir. 1986); *Wunbourne v. Eastern Air Lines, Inc.*, 632 F.2d 219, 223 (2nd Cir. 1980); *Franklin v. Oklahoma City Abstract & Title, Co.*, 584 F.2d 964, 967 (10th Cir. 1978). Indeed, the Oklahoma Supreme Court itself wrote in *Lewis v. Phillips Petroleum Co.*, 559 P.2d 868, 870-871 (Okla. 1977):

> The entrance of a judgment only four days after filing a motion for it is an unreasonable rush to judgment, particularly when notice of hearing was attempted by mail. Moreover, there inheres

> in the factual situation here an even more serious defect—an entire absence of notice. [...] It requires no great intellect to grasp the idea that a summary adjudication deprives one party of a day in court.

Finally, it should be noted that most Courts have historically been attuned to the due process violations caused when a trial court without advance notice or a reasonable opportunity to respond, converts a dispositive motion into an entirely different kind of dispositive motion just prior to its ruling. *See Georgia So. & Florida Ry. Co., v. Atlantic Coast Line R. R. Co.*, 373 F. 2d 493, 497-498 (5th Cir. 1967), *certiorari denied* 389 U.S. 851; 88 S. Ct. 69; 19 L.Ed.2d 120; *Finn v. Gunter*, 722 F.2d 711, 713 (11th Cir. 1984); *Johnson v. RAC Corp.*, 491 F.2d 510, 513 (4th Cir. 1974); *Gutierrez v. El Paso Community Action Program*, 462 F.2d 121, 121-122 (5th Cir. 1972); *Winkleman v. New York Stock Exchange*, 445 F.2d 786, 789 (3rd Cir. 1971); *Big Apple Cookie Co., v. Springwater Cookie Co.*, 517 F. Supp 372, 373 (D. Oh. 1981); *Whiting v. Maiolini*, Supra; *U.S. v. One Colt Python .357 Cal. Revolver*, Supra.; *Franklin v. Oklahoma City Abstract,* Supra.

Without trying to argue the merits here, prematurely, Wilbanks would briefly note that this case presents the factual circumstance of the district court converting McFarland's Motion for Summary Judgment into a Motion to Confirm the Arbitration Award, and then instantly ruling on same, with no prior notice to Wilbanks and absolutely no opportunity for Wilbanks to present any arguments

that it had against the new motion. *See* A-34; A-69-70. Had Wilbanks known the nature of the dispositive motion it was facing, it would have responded differently. Specifically, Wilbanks would not have focused on the procedural flaws of McFarland's Motion for Summary Judgment if it had known it was facing a Motion to Confirm the Arbitration Award. Fundamentally this case presents an issue of federal law -- what minimum procedural due process, if any, is owed to a party that brings a statutorily authorized challenge to an arbitration award.

A Writ of Certiorari is warranted because this case presents an interesting set of facts with an important federal legal issue never before considered by the United States Supreme Court. Specifically, issues of procedural due process have never been addressed by this Court in the context of a statutorily allowed post-arbitration appeal. This is a "new twist" on the issue of procedural due process, and an important one given the nation's growing reliance upon arbitrations. Arbitrations are widely encouraged as a means of reducing costs and easing the burdens on state and federal courts. Certainly, the issues presented by this Petition for Writ of Certiorari have a broad application, being issues of fundamental constitutional law that frequently present themselves in each and every federal district and state court.

Finally, from a public policy standpoint, the willingness of parties to arbitrate their claims and the public confidence in the arbitration process as a

whole may greatly diminish if it becomes universally accepted that even minimum due process is simply not afforded in a post-arbitration challenge. If an arbitration is tainted by bias or corruption, parties will have no confidence in the legal system to provide a remedy. Indeed, many would find that a remedy afforded without minimum due process safeguards is hardly a remedy at all.

Here, the failure to conclusively resolve these due process issues could have a chilling effect on arbitrations; an effect which is detrimental to all parties and the courts. Wilbanks respectfully maintains that the published Opinion from the Oklahoma Court of Civil Appeals incorrectly determines a significant issue of federal law that has not been, but should be, settled by the United Supreme Court.

CONCLUSION

For all these reasons, a Writ of Certiorari should issue.

Respectfully submitted,

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IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

MONDAY, FEBRUARY 8, 2010

[DATE STAMP]
FILED
SUPREME COURT
STATE OF OKLAHOMA
FEB – 8 2010
MICHAEL S. RICHIE
CLERK

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

105,451 Wilbanks Securities, Inc., v. Donald R. McFarland
Petition for certiorari is denied.
ALL JUSTICES CONCUR

* * *

/s/_____
CHIEF JUSTICE

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

[DATE STAMP]
FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
OCT - 8 2009
MICHAEL S. RICHIE
CLERK

WILBANKS SECURITIES, INC.,
Plaintiff/Appellant,

vs. Case No. 105,451

DONALD R. MCFARLAND,
Defendant/Appellee.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE VICKI L. ROBERTSON, TRIAL JUDGE

AFFIRMED

Andrew J. Waldron
WALKER & WALKER
Oklahoma City, Oklahoma For Appellant

Rodney J. Heggy
HEGGY & ASSOCIATES, LLC
Oklahoma City, Oklahoma For Appellee

OPINION BY DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 This is an appeal from the trial court's order confirming an arbitration award and from a judgment denying a motion for new trial and awarding attorney fees. In November 2004, Wilbanks Securities, Inc. (WSI) submitted a dispute between it and Donald R. McFarland (McFarland) to the National Association of Securities Dealers' (NASD)[1] Arbitration Panel (NASD Panel).[2] McFarland is a licensed insurance agent and a "Series 6" registered security representative. He worked as an independent contractor for WSI, a retail securities broker and dealer and member of NASD,

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[1]NASD is now known as the Financial Industry Regulatory Authority.

[2]NASD Uniform Submission Agreement, Record (R.), p. 372. This NASD Uniform Submission Agreement provides that WSI and McFarland agreed that a judgment could be entered on the NASD Panel's award. There is no issue raised in this appeal that the dispute was not properly submitted to NASD Panel for arbitration.

under a written Independent Contractor Agreement, dated June 11, 1999, and a September 20, 2002, Agreement (collectively, Agreement).[3] WSI terminated McFarland in September 2004 for alleged breach of the Agreement. WSI then claimed monies were owed by McFarland to it, but McFarland claimed it was WSI that owed him.

¶2 WSI asserts it presented to NASD Panel its allegations of breach of contract, breach of good faith, "selling away" securities that are unregistered or not approved for sale, tortious interference with business, and common law fraud. McFarland asserted a number of defenses and claims for defamation, wrongful confiscation of commissions, and wrongful imposition of a $20,000 fine.[4]

¶3 The dispute was heard by NASD Panel on April 11, 12, and 13, 2006, and NASD Panel's arbitration award (Award)[5] was issued on May 18, 2006. The Award dismissed WSI's claims and found WSI liable to McFarland for withheld commissions, future renewals, the $20,000 fine, expert witness fees, attorney fees, and expenses, in addition to other relief including expungement of McFarland's NASD public records.

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[3]R., pp. 373, 396-400.

[4]The record contains no pleadings from the arbitration; however, the arbitration award contains a recitation of the claims and defenses NASD Panel had before it.

[5]R., p. 13-21.

¶4 On June 16, 2006, WSI filed a "Petition to Vacate or Modify Arbitration Award" in the District Court of Oklahoma County, alleging jurisdiction under the Oklahoma Uniform Arbitration Act, 12 O.S. Supp. 2005 §§ 1874, 1875, and 1878. On June 27, 2006, McFarland removed the case to federal court. The federal district court, however, remanded the case back to state court. The federal district court found the Federal Arbitration Act (FAA)[6] did not create independent federal jurisdiction that would support removal, even though the arbitration award vacation provisions in § 10 have been applied to NASD arbitration awards in the U.S. Court of Appeals for the Tenth Circuit.[7]

¶5 With leave of the state trial court, WSI was allowed to file an "Amended Petition," filed on March 30, 2007, and then to file its "Second Amended Petition to Vacate or Modify Arbitration Award," (Second Amended Petition) on April 6, 2007. WSI alleges NASD Panel disregarded the terms of the Agreement, acted in an arbitrary and capricious manner, was not impartial, improperly refused to postpone the arbitration hearing, and refused to permit certain witnesses to testify. WSI asked the trial court to vacate and/or modify the Award and to award it

---

[6]Title 9 U.S.C. §§ 1-16 (as amended 2006). Section 10(a) contains language similar to that contained in 12 O.S. Supp. 2005 § 1874 (effective January 1, 2006).

[7]R., pp. 53-61.

attorney fees.

¶6 On June 1, 2007, McFarland filed a Motion for Summary Judgment, urging NASD Panel's decision be confirmed and that the trial court enter judgment on the Award. McFarland also requested attorney fees under 12 O.S. Supp. 2002 § 936, and 40 O.S.2001 § 165.9. WSI filed its Response to McFarland's Motion for Summary Judgment, and on October 5, 2007, McFarland filed his Reply.

¶7 At a hearing on October 26, 2007, the trial court announced it was converting McFarland's Motion for Summary Judgment into a Motion to Confirm the Arbitration Award, and was sustaining McFarland's motion to confirm the Award.[8] On November 6, 2007, the Order embodying this ruling was filed, and WSI moved for a new trial on November 16, 2007. WSI argued that the trial court should not have converted McFarland's Motion for Summary Judgment to a Motion to Confirm the Arbitration Award and that the trial court should have allowed WSI leave to conduct depositions.[9] The trial court denied the motion for new trial and granted McFarland attorney fees. The trial

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[8]R., p. 449.

[9]On June 13, 2007, WSI had issued McFarland deposition notices for an arbitrator, McFarland's expert witness, and an attorney. On June 18, 2007, McFarland filed a Motion to Quash the deposition notices. WSI did not file a response. The trial court granted the Motion to Quash on October 29, 2007, finding WSI was not entitled to engage in discovery at this point.

court ordered that McFarland shall have judgment against WSI "in the amount of $295,366.75 (which is the combined amount of the original award, $271,346.00, plus attorney's fees in the amount of $24,020.75)," plus interest. From the trial court's order confirming NASD Panel's Award and its judgment, filed on December 13, 2007, granting attorney fees to McFarland and denying WSI's motion for new trial, WSI appeals. We affirm.

STANDARD OF REVIEW

¶8 Oklahoma has adopted a modified version of the Uniform Arbitration Act (OUAA).[10] Oklahoma favors arbitration agreements. *Voss v. City of Oklahoma City,* 1980 OK 148, 618 P.2d 925. Generally, in reviewing a district court's decision concerning a motion to vacate an arbitration award, we review questions of law *de novo* and factual findings for clear error. *Thompson v. Bar-S Foods, Co.,* 2007 OK 75, 174 P.3d 567; *Bowen v. Amoco Pipeline Co.,* 254 F.3d 925 (10th Cir. 2001) (construing Oklahoma law) (court looks to see if arbitrators exceeded their powers or rendered a decision in manifest disregard of the law). This appellate review affords the arbitrators great deference. *Fraternal Order of Police, Lodge 142 v. City of Perkins,* 2006 OK CIV APP 122, 146 P.3d 829.

---

[10] 12 O.S. Supp. 2005 §§ 1851-1881, originally effective on October 1, 1978 and codified at 15 O.S.1981 §§ 801, *et seq.*

¶9 Under the FAA,[11] the federal counterpart to the OUAA, review of a panel's award is strictly limited to a highly deferential standard because a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

¶10 A trial court's decision on whether to grant a new trial is reviewed on an abuse of discretion standard. *Jones, Givens, Gotcher & Bogan, P. C. v. Berger,* 2002 OK 31, 46 P.3d 698. A finding of abuse requires that the trial court made a clearly erroneous conclusion and judgment, against reason and evidence. *Meadows v. Wal-Mart Stores, Inc.,* 2001 OK 25, 21 P.3d 48.

ANALYSIS

¶11 Arbitration, a legislative creation, is the referral of a dispute by the voluntary agreement of the parties to one or more impartial arbitrators for a final and binding decision as a determination of their dispute. An arbitration award is made on the basis of evidence and argument presented by the parties who agree in advance to accept the decision of the arbitrator as final

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[11]Oklahoma courts look to the FAA in interpreting Oklahoma's arbitration laws, even when no interstate commerce is at issue nor any agreement that falls within the FAA. *See Oklahoma Oncology & Hematology, P.C. v. U.S. Oncology, Inc.*, 2007 OK 12, 160 P.3d 936.

and binding. Arbitration can also be non-binding under the referring parties' agreement.

¶12 The fundamental purpose of arbitration is to preclude court intervention into the merits of disputes when arbitration has been provided for contractually. Courts generally favor arbitration statutes because they provide substantial justice by an immediate and speedy resolution with a minimum of court interference. *Rollings v. Thermodyne Industries, Inc.*, 1996 OK 6, 910 P.2d 1030; *Voss v. City of Oklahoma City,* 1980 OK 148, 618 P.2d 925.

¶13 Oklahoma and other states have enacted statutory provisions that circumscribe the limited grounds upon which an arbitration award may be set aside. These statutes address the tension between, on one hand, disallowing factual review, which supports the finality of arbitration and protects the ideals of neutrality, confidentiality, and speediness, while on the other hand, allowing factual review, which fosters the fairness of the outcome.

¶14 Only in limited circumstances may a motion to vacate an arbitration award be granted. In Oklahoma, 12 O.S. Supp. 2005 § 1874 provides the limited grounds under which a party to an arbitration may attempt to vacate an arbitration award. That statute provides, in pertinent part, as follows:

> A. Upon an application and motion to the court by a party to an arbitration

proceeding, the court shall vacate an award made in the arbitration proceeding if:

1. The award was procured by corruption, fraud, or other undue means;

2. There was:

a. evident partiality by an arbitrator appointed as a neutral arbitrator,
b. corruption by an arbitrator, or
c. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

3. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 6 of this act, so as to prejudice substantially the rights of a party to the arbitration proceeding;

4. An arbitrator exceeded the arbitrator's powers ....

(Footnote omitted.)

¶15 WSI raises several issues on appeal; *i.e.,* that the trial court erred: (i) by ruling on McFarland's Motion for Summary Judgment without "conducting a trial" or allowing discovery; (ii) by even considering McFarland's Motion for Summary Judgment when it allegedly did not meet the precise dictates of District Court Rule 13; (iii) by converting, at the October 26,2007, hearing, the Motion for Summary Judgment into a motion to confirm the arbitration award without any notice or opportunity for WSI to respond; (iv) by ignoring the fact that a petition to vacate is allowed by law and by ruling on it summarily; (v) by not having a trial on WSI's Second Amended Petition; (vi) by denying WSI's motion for new trial, and (vii) by awarding attorney fees and costs to McFarland.

¶16 WSI's first five assertions of error can be distilled into one basic complaint – that the trial court did not conduct a hearing or trial on its Second Amended Petition or on McFarland's Motion for Summary Judgment, converted by the trial court to a motion to confirm the Award. These assertions of error give rise to the question of what process is due when an arbitration award is challenged under the grounds set forth in § 1874.

a. Trial Court's Conversion of the Motion for Summary Judgment

¶17 WSI challenges the trial court's conversion of McFarland's Motion for Summary Judgment into a motion to confirm the Award. We find no merit in this

assertion of error.

¶18 WSI's Second Amended Petition sought post-adjudication relief from the Award. McFarland filed his Motion for Summary Judgment, to which WSI responded on September 28, 2007. McFarland filed a reply.

¶19 McFarland's Motion for Summary Judgment is a misnomer and does not reflect the actual procedural posture of this case. It is actually a motion to confirm the Award because a motion for summary judgment is a request for pre-adjudication relief and is not applicable to post-adjudication issues. The meaning and effect of an instrument filed in court depend on its contents and substance, rather than on its form. *Horizons, Inc. v. Keo Leasing Co.,* 1984 OK 24, 681 P.2d 757 ; *Amarex, Inc. v . Baker,* 1982 OK 155, 655 P.2d 1040. Title 12 O.S. Supp. 2005 § 1873 allows for an "application and motion" to be filed when requesting an arbitration award be "confirmed."

¶20 Likewise, WSI's Second Amended Petition is misnamed and not reflective of the procedural status of this matter. Title 12 O.S. Supp. 2005 §§ 1874-1875 provide that a party to an arbitration seeking to vacate an award may file an "application and motion" – not a "Petition" or Second Amended Petition. This is not merely a semantical distinction. The language of the FAA and § 1873 of the OUAA reflects the proper procedural posture of a party's request that an arbitration award be vacated or confirmed. The

substance of WSI's Second Amended Petition is, in fact, that of a motion or application to vacate the arbitration Award, while McFarland's "Motion for Summary Judgment" is actually a motion to confirm the Award.[12] The effect of a document filed in court depends on its content and the statutes allowing it to be filed. We find the trial court properly recast McFarland's Motion for Summary Judgment as a motion to confirm the Award and treated it as such.[13]

b. Trial Court's Failure to Conduct a Hearing or Trial

¶21 WSI also asserts that the trial court erred in ruling on McFarland's Motion for Summary Judgment without conducting a hearing and by not having a trial on WSI's Second Amended Petition. This argument stems from WSI's misperception that its Second Amended Petition was something other than a motion to vacate the arbitration award. WSI filed its response to McFarland's Motion for Summary Judgment, to which McFarland replied. The trial court set the motion on the docket. The trial court stated that it had "received and read and reviewed the following documents: The Defendant's Motion for Summary

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[12]Section 6 of the FAA also provides that any application made shall be treated like a motion.

[13]Because the trial court did not consider McFarland's Motion for Summary Judgment as a summary judgment, District Court Rule 13 was inapplicable. Okla. Dist. Ct. Rule 13, 12 O.S. Supp. 2002, ch.2, app.

Judgment, all of these with briefs and numerous exhibits attached; Plaintiff's Response to same; Defendant's Reply. In addition, the Court has been furnished a transcript from the arbitration hearing held on April 11, 12, and 13 of 2006." [14] Counsel for both parties agreed on the record that that was the "complete set of documents the Court has to review for today's hearing."[15] The trial court further stated that it has "thoroughly read these documents. I had read some of them before the last time we met and [am] prepared to rule at this time. Based upon the pleadings, [the trial court] has no need for any additional oral argument."[16] We disagree with WSI's assertion that its Second Amended Petition or the Motion for Summary Judgment on it, filed by McFarland, requires the same procedural due process that a petition initiating a lawsuit under 12 O.S.2001 § 2003 is due. WSI's Second Amended Petition is actually an "application" or "motion," and as such is not entitled to the same procedural due process that a § 2003 petition would receive.

¶22 For example, in *Health Services Management Corp. v. Hughes,* 975 F.2d 1253 (7th Cir. 1992), the appellate court considered an appeal from a district court order confirming an arbitration award. The party

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[14] R., at 449 (Transcript of October 26, 2007, hearing, at p. 3).

[15] *Id.*

[16] *Id.* at p. 4.

against whom the award was entered, HSM, argued as WSI does in this case, that the award was procured by undue means, evident partiality, other misbehavior by the arbitrators and that the award was contrary to contract law.

¶23 The *Health Services Management* district court, *without notice or hearing, pre-trial or scheduling conference,* entered its order denying the application to vacate the arbitration award. On appeal, HSM contended that the district court erred in entering its order without granting HSM process under Rule 16 of the Federal Rules of Civil Procedure. HSM argued that the court should have held a scheduling conference, a pre-trial conference, ordered briefs to be filed and ordered transcripts of the arbitration to be filed.

¶24 The circuit court rejected HSM's argument, citing Rule 1 of the Federal Rules of Civil Procedure, which states that the rules govern the procedure in U.S. district courts in all civil suits with the exception of proceedings under the FAA. "It would defeat the purpose of arbitration if a reviewing court was obligated to give all the *due process* owed to parties filing actions of a civil nature and deserving of Federal Rule 16 treatment, e.g., a scheduling conference, hearing, etc. Thus, 'the court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be

frustrated.'" *Id.* at 1258. (Emphasis added.)[17]

¶25 Arbitration procedures are more streamlined than federal litigation. The relative informality of arbitration is one of the chief reasons that parties select arbitration. Parties trade the procedure and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. *See 14 Penn Plaza LLC v. Pyett*, __ U.S. __, 129 S.Ct. 1456 (2009).

c. Trial Court's Failure to Allow Post-Arbitration Discovery

¶26 The crux of WSI's complaint – that it had no opportunity to respond to the Motion for Summary Judgment when recast by the trial court *sua sponte* as a motion to confirm the arbitration award – is its desire to conduct post-arbitration award discovery in an attempt to meet its burden of proving one or more of the § 1874 statutory grounds, set forth in its Second Amended Petition, upon which an arbitration award may be vacated. In its Second Amended Petition, WSI asserted three § 1874 statutory grounds for vacating an arbitration award: (1) the arbitrators failed to

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[17]In construing the Oklahoma Pleading Code, courts may consider the federal counterpart from which it was derived. *Visteon Corp. v. Yazel*, 2004 OK CIV APP 52, 91 P.3d 690. The Oklahoma Pleading Code does not apply to arbitrations. *See* 12 O.S.2001 § 2001, and the Committee Comment to 12 O.S.2001 § 2001, which states, in part, that the Code does not apply to proceedings held before a body other than a district court.

postpone the hearing and to consider material evidence; (2) the arbitrators acted with evident partiality; and, (3) the arbitrators exceeded their authority by failing and refusing to apply certain provisions of the Agreement and thus acting in an arbitrary and capricious manner that exceeded its powers.[18]

¶27 In particular, WSI claims:[19]

(1) that NASD Panel denied two motions to continue the arbitration WSI filed in the months leading up to the hearing. WSI had asked for more time to obtain discovery from non-NASD member insurance providers;

(2) that NASD Panel intimidated witness Aaron Wilbanks by requesting counsel to cut his testimony short if it was wordy or repetitive; and,

(3) that NASD Panel refused to permit further telephone witnesses and simply refused to allow witness Denver Klaussen to testify though he was physically present at the hearing. Further, NASD Panel refused to allow WSI's witness James Stockton

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[18]To support this assertion of error, WSI relies on the "arbitration transcripts" and "briefing record." In addition, WSI intends to rely on the results of "future discovery."

[19]Second Amended Petition, R., p. 283.

to testify.[20]

WSI alleges there are factual disputes as to these issues, which should have prevented the trial court's summary disposition. WSI also states that it "intends" to present testimonial and documentary evidence to support its Second Amended Petition. WSI contends that if "reasonable discovery is allowed, further evidence of arbitrator partiality will be sought from third party witnesses" and from the arbitrator.

¶28 WSI issued three deposition notices to obtain testimony to use in response to McFarland's Motion for Summary Judgment. McFarland moved to quash the deposition notices, WSI never responded, and the trial court granted the motion to quash.[21]

¶29 WSI sought to depose one of the arbitrators, Peter Bradford, a local attorney, Lisa Muggenborg, an attorney, and McFarland's expert witness, Gary Chartier, who testified at the arbitration hearing and was available then for questioning by WSI.[22]

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[20]Second Amended Petition, R., p. 287.

[21]The order granting the Motion to Quash is not on appeal before this Court. We consider this issue, however, because of its direct relation to WSI's allegation that the trial court erred by not having a hearing on McFarland's Motion for Summary Judgment or on WSI's Second Amended Petition.

[22]McFarland's Motion to Quash Notice of Depositions, R., at pp. 404-405.

¶30 WSI argues that it should have been allowed to conduct depositions to prove the evident partiality of the arbitrators. We disagree.

¶31 An attempt by a party to investigate, through discovery, whether the arbitrators were neutral and unbiased threatens the conclusiveness of the arbitration process. Consequently, courts are reluctant to permit discovery as to the potential bias of an arbitrator. Such process undermines the authority of the arbitrator and injects delay in confirmation or vacation.

¶32 At the same time, the arbitration process must be unbiased and avoid an appearance of bias. *Nationwide Mutual Insurance Co. v. The Home Insurance Co.,* 90 F. Supp. 2d 893 (S.D. Ohio, E.D. 2000). The *Nationwide Mutual Insurance* court stated that although it may be difficult to prove actual bias without deposing the arbitrators, depositions of arbitrators are repeatedly condemned by courts. In the absence of clear evidence of impropriety, a party is not entitled to discovery by way of deposing one or more arbitrators. *Id.* at 899. Evident partiality under the FAA[23] and § 1874 would be found only "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 899. (Citations omitted.) An "adverse award in and of itself is no evidence of bias absent some evidence of improper motivation." *Id.* at 901. (Citation

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[23]9 U.S.C. § 10 (a)(2) (as amended 2006).

omitted).

¶33 Even though the *Nationwide Mutual Insurance* court had some evidence of record to consider, it found that the movant had not established by clear evidence of impropriety any right to limited discovery. The *Nationwide Mutual Insurance* court also denied the movant's request to depose opposing counsel, absent a showing of extraordinary circumstances. We find WSI has not provided by clear evidence of impropriety, or a showing of extraordinary circumstances, any right to limited discovery.

¶34 Further, WSI complains in the Second Amended Petition that there "was evident partiality by an arbitrator" Peter Bradford in that he:

> failed to disclose that, prior to this arbitration, he had worked with Attorney Lisa Muggenborg with regard to a company known as Broadband Wireless International. That relationship is important because Attorney Muggenborg has prosecuted and does currently prosecute claims against [WSI]. It is likely Muggenborg confided in and communicated with Mr. Bradford concerning the claims against [WSI] and that such prevented him from being impartial or having the appearance of

impeccability.[24]

WSI sums up this complaint of bias by alleging that all the NASD Panel members were biased and partial because of their handling of evidentiary matters, procedure, and the ruling itself.

¶35 The *Health Services Management* court also stated, "when a claim of partiality as to an arbitration award is made, the court is under an obligation to scan the record to see if it demonstrates evident partiality on the part of the arbitrators." *Health Services Management Corp. v. Hughes,* 975 F.2d 1253, 1258 (7th Cir. 1992). Absent a verbatim transcript of the arbitration hearing, this Court must presume regularity of the arbitration proceedings and the resulting arbitration award. *Motor Wheel Corp. v. Goodyear Tire & Rubber Co.,* 98 Ohio App. 3d 45, 647 N.E.2d 844 (1994).

¶36 Evident partiality under the FAA means more than a mere appearance of bias. Arbitrators are usually knowledgeable in a given field and often have interests and relationships that overlap with the matter they are considering as arbitrators. The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator. *Florasynth, Inc.* v. *Pickholz,* 750 F.2d 171 (2nd Cir. 1984). To set aside an award for arbitration partiality, the interest or bias must be direct, definite and capable of demonstration

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[24]R., p. 285.

rather than remote, uncertain or speculative. *Tafari v. Bache Halley Stuart, Inc.*, 619 F.2d 1196 (7th Cir. 1980). The *Health Services Management* court stated, "[the record here is completely barren of any evidence of such direct and definite partiality." Such is the case in the instant appeal. *Id.* at 1264.

¶37 We, like the *Health Services Management* court[25] and the trial court, are hampered in considering any of WSI's assertions of error by an incomplete record.[26] The appellate record only contains a copy of the NASD Award, a copy of the Agreement, pleadings, and motions filed in the trial court, and a five-page transcript of the trial court's October 26,

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[25]HSM's application to vacate the arbitration award was not accompanied by any exhibits or copies of the transcript. Thereafter, seven pages of the transcript, of at least 455 pages in length, and a copy of the contract at issue in the arbitration were attached to the response brief of Hughes, the other party to the arbitration. HSM attached nothing to its reply.

[26]*See also Ormsbee Development Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1982)(circuit court upheld district court's refusal to grant an evidentiary hearing on matters relating to the conduct of the arbitration proceeding which were outside the arbitration record and stated that the finality of arbitration weighs heavily in its favor and cannot be upset absent exceptional circumstances; *Jamison & Harris v. National Loan Investors*, 939 S.W.2d 735 (Tex. App., Houston 1997)(where appellant furnished no record of the arbitration proceedings to establish its claim that the arbitrator refused to hear evidence on its claims and relied on summary judgment procedure to enter an award, reviewing court is unable to determine what evidence was refused or offered and must presume the evidence was adequate to support the award).

2007, announcement of its ruling on McFarland's Motion for Summary Judgment/motion to confirm the arbitration award. WSI has produced no exhibits, affidavits, certified depositions of arbitration witnesses nor any certified transcript of the arbitration hearing.[27]

¶38 A *transcription* of audio tapes made of the arbitration hearing is included on appeal; however, the court reporter, who prepared the transcription, admits it is an "attempt" to transcribe poorly recorded audio tapes, stating:

> The following transcript is my best effort at transcribing this hearing from audio tapes supplied to me. I was not present at the hearing and so I was only able to try to identify speakers by their voices and using my experience of having reported similar hearings such as these during my reporting career.

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[27]McFarland asserts, citing to the incomplete and uncertified transcription of the audio tapes of the arbitration hearing, that at all times, WSI accepted NASD Panel and that WSI knew the identity of the arbitrators for over a year, giving it plenty of time to know of any connection between an arbitrator and to any other lawyer suing WSI. "Wilbanks could not await the Award and then move to vacate it as an excuse to inquire into partiality." McFarland's Brief, at p. 18. We cannot determine whether these assertions of McFarland are accurate without a complete record.

> The tapes were not of very good audio quality and also at times stopped abruptly in the middle of statements being made by persons at the hearing. Extraneous noises such as coughing or shuffling of papers near the microphone, a loud air conditioning system, and persons too distant from the microphone or speaking too softly obscured many portions of the hearing. I did my best to report what I could clearly hear on the tapes, but I do not certify this transcript as if it were a verbatim transcript normally prepar[ed] by me at a hearing that I attend in person.[28]

Furthermore, the transcription does not comply with Oklahoma Supreme Court Rule 1.30, 12 O.S.2001, ch. 15, app. 1.

¶39 No issue will be resolved upon a critically deficient record. *Booth* v. *McKnight,* 2003 OK 49,70 P.3d 855. Without a sufficient record, this Court cannot, as the trial court could not, determine whether any NASD Panel decisions violated § 1874.

¶40 Because WSI bears the burden of proof, failure to present a record for review is fatal to its appeal. *Hamid v. Sew Original,* 1982 OK 46, 645 P.2d 496; *In the Matter of the Estate of Fields,* 1998 OK CIV APP

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[28]R., at 79.

129, 964 P.2d 955 (trial court's decision is presumed correct in the absence of a stenographic record made at the hearing and no narrative statement made in accordance with Okla. Sup. Ct. R. 1.30). Without a record of the arbitration proceeding, this Court can only presume the Award is without error.[29]

Denial of WSI's Motion for New Trial

¶41 WSI asserts that the trial court improperly denied its motion for new trial. A trial court's decision on whether to grant a new trial is reviewed on an abuse of discretion standard. *Jones, Givens, Gotcher & Bogan, P.C. v. Berger,* 2002 OK 31, 46 P.3d 698. Where it appears that the defeated litigant did not present valid reasons for a new trial, and the record is barren of sufficient legal grounds for ordering a reexamination of fact issues, this Court will hold that none existed. *Bishop's Restaurants, Inc. of Tulsa v. Whomble,* 1960 OK 44, 355 P.2d 560.

¶42 WSI also complains that the trial court denied its motion for new trial even though McFarland never

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[29] *See, e.g., Commonwealth Associates v. Letsos,* 40 F. Supp. 2d 170 (S.D.N.Y. 1999)(court denied motion to vacate arbitration award based on deficiency of incomplete transcriptions of audio tapes of arbitration hearing not certified as accurate); *Motor Wheel Corp. v. Goodyear Tire & Rubber Co.,* 98 Ohio App. 3d 45, 647 N.E.2d 844 (1994)(where the court did not have a verbatim transcript or other complete record of the evidence and arguments presented at the arbitration hearing, resulting arbitration award is presumed correct).

filed a response to that motion. Rule 4(e)[30] is not self-executing. The trial court retains discretion to review motions whether or not an opposing brief is filed. *Pipes v. Smith,* 1987 OK CIV APP 66, 743 P.2d 1110. In the absence of a record, we find the trial court did not abuse its discretion by denying WSI's motion for new trial.

Trial Court's Award of Attorney Fees and Costs to McFarland

¶43 With this affirmance of the trial court's judgment, and because WSI failed to brief the issue, there is no basis for setting aside the trial court's award of attorney fees and costs to McFarland.[31]

CONCLUSION

¶44 In the absence of a complete record, WSI has failed to prove it is entitled to any modification or vacation of the arbitration award. This Court must presume the trial court did not err. *Hamid v. Sew Original,* 1982 OK 46, 645 P.2d 496. We affirm the trial court's November 6, 2007, Order and the

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[30]Rules for the District Courts, 12 O.S. Supp. 2002, ch. 2, app.

[31]We also deny McFarland's request for attorney fees *on appeal* for failure to brief the issue. Failure to brief an issue on appeal results in a waiver of the right to have it considered on appeal. Rule 1.11(k)(2), Okla. Sup. Ct. Rules, 12 O.S.2001, ch. 15, app. 1.

December 13, 2007, Judgment.

¶45 AFFIRMED.

WISEMAN, V.C.J, and GOODMAN, J., concur.

October 8, 2009

DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[DATE STAMP]
FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
DEC 13 2007
PATRICIA PRESLEY COURT CLERK
by /s/
Deputy

WILBANKS SECURITIES, INC.,
Plaintiff,

Case No. CJ-2006-5002

vs.

Judge Vicki L. Robertson

DONALD R. McFARLAND,
Defendant/Respondent
Counter Claimant.

JUDGMENT

NOW on this 13th day of December, 2007, the Court pronounces Judgment in the above-styled case. On this date, the case comes on for Hearing on the parties' pending Motions. Having been advised that the parties have reached an agreement concerning the pending matters, THE COURT FINDS AND ORDERS as follows:

1. In his Motion for Attorney's Fees, the Defendant has demonstrated that he has incurred attorney's fees in the amount of $24,020.75. While the Plaintiffs do not stipulate that the Defendant is entitled to collect attorney's fees, they do stipulate to the amount that the Defendant has set forth. Further, after the completion of the appeal process and in the event that the Defendant is ultimately successful on appeal, the Plaintiffs agree to pay the Defendant's attorney's fees in the amount of $24,020.75 for pre-appeal matters. THE COURT THEREFORE FINDS AND ORDERS that the Defendant's attorney's fees shall be awarded in the amount of $24,020.75.

2. The parties agree that the Defendant was awarded $271,346.00 by the Arbitration Panel and that the award was affirmed by this Court when the Court converted and sustained the Defendant's Motion for Summary Judgment. The Plaintiffs filed a Motion for New Trial with this Court and THE COURT FINDS AND ORDERS that the Motion for New Trial should be and is hereby denied. Thereafter, the Plaintiffs announce their intent to appeal the award to the Supreme Court of Oklahoma and orally moved the Court to set a supersedeas bond.

3. The parties agree that the amount of the award has been accruing interest and will continue to

accrue interest at the rate of 9.25% during the pendency of the appeal. The parties have estimated that the appeal process will take approximately eighteen (18) months to conclude. Therefore, the parties agree and THE COURT FINDS AND ORDERS that the amount of the original award, plus the interest earned thus far, plus the interest that will be earned over the next eighteen (18) months, plus the agreed upon amount of attorney's fees, equals $337,069.49.

4. The parties further agree and THE COURT FINDS AND ORDERS that in order to perfect its appeal, the Plaintiffs shall post a cash or surety bond in the amount of $337,069.49. The Plaintiffs shall have thirty (30) days from today's date in which to post the amount. During the pendency of the thirty (30) days, any and all efforts to collect upon the judgment shall be stayed. Upon the posting of a cash or surety bond by the Plaintiffs and upon their timely perfection of the appeal, any and all efforts to collect upon the judgment shall be stayed during the pendency of the appeal.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant shall have JUDGMENT against the Plaintiffs in the amount of $295,366.75 (which is the combined amount of the original award, $271,346.00 plus attorney's fees in the amount of $24,020.75). It is further ORDERED,

ADJUDGED, AND DECREED that from today's date forward, the judgment shall hereafter accrue interest at the statutory rate of 10.25%.

Entered in Judgment this 13th day of December, 2007.

/s/
VICKI L. ROBERTSON
JUDGE OF THE DISTRICT COURT

APPROVED:

/s/
Bill V. Wilkinson, OBA No. 9621
Sarah McAmis, OBA No. 15903
Wilkinson McAmis Law Firm
7625 East 51st Street, Suite 400
Tulsa, Oklahoma 74145-7857
Tel: 918/663-2252; Fax: 918/663-2254

ATTORNEYS FOR PLAINTIFF
WILBANKS SECURITIES, INC.

/s/
Rodney J. Heggy, OBA No. 4049
HEGGY & ASSOCIATES, LLC
10205 North Pennsylvania Avenue
Oklahoma City, OK 73120
Tel: 405/235-1560; Fax: 405/239-2112

I, PATRICIA PRESLEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 23 day of January, 2008

PATRICIA PRESLEY, Court Clerk

By /s/ _____ Deputy

DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[DATE STAMP]
FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
NOV - 6 2007
PATRICIA PRESLEY, COURT CLERK
by /s/_____
DEPUTY

WILBANKS SECURITIES, INC.,
Plaintiff / Claimant /
Counter Respondent,

vs. Case No. CJ-2006-5002

DONALD R. McFARLAND,
Defendant / Respondent
Counter Claimant.

ORDER

On this 26th day of October, 2007, the above case came on for Hearing on the Defendant's Motion for Summary Judgment. The Defendant, Donald R. McFarland, appeared by and through Rodney J. Heggy. The Plaintiff, Wilbanks Securities, Inc., appeared by and through Sarah McAmis of Wilkinson • McAmis Law Firm. The Court informed the parties that in preparation for the Hearing, she had read and considered the Defendant's Motion for Summary

Judgment, the Plaintiff's Response to the Motion for Summary Judgment, the Defendant's Reply to the Plaintiff's Response, and the transcripts of the Arbitration Hearing. The Court then waived any further oral argument and found as follows:

The Court hereby ORDERS, FINDS, AND DECREES that the Defendant's Motion for Summary Judgment shall be converted by the Court into a Motion to Confirm the Arbitration Award. The Court further ORDERS, FINDS, AND DECREES and that the Motion to Confirm the Arbitration Award should be and is hereby SUSTAINED.

/s/
VICKI L. ROBERTSON
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/
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Sarah McAmis, Esq.
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ATTORNEY FOR DEFENDANT DON MCFARLAND

DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[DATE STAMP]
FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
OCT 29 2007
PATRICIA PRESLEY, COURT CLERK
by /s/_____
DEPUTY

WILBANKS SECURITIES, INC.,
Plaintiff / Claimant /
Counter Respondent,

vs. Case No. CJ-2006-5002

DONALD R. McFARLAND,
Defendant / Respondent
Counter Claimant.

ORDER GRANTING MOTION
TO QUASH NOTICE OF DEPOSITIONS

On this 30th day of August 2007, the Defendant, Donald R. McFarland appeared through Rodney J. Heggy, Esq. and Wilbanks Securities, Inc. appeared through Sarah McAmis, Esq. of Wilkinson · McAmis Law Firm on the Court's regular motion docket. The Court heard argument and being otherwise apprised of the premises:

The Defendant, Donald R. McFarland's, Motion to Quash is GRANTED because the Defendant is not entitled to discovery, and

The Plaintiff, Wilbanks Securities, Inc. is granted until September 28, 2007, to respond to McFarland's Motion for Summary Judgment. The matter is set for hearing October 26, 2007, at 2:00 p.m. (changed by the Court from October 18).

/s/
VICKI L. ROBERTSON
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/
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Sarah McAmis, Esq.
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IN THE COURT OF CIVIL APPEALS OF
THE STATE OF OKLAHOMA

[DATE STAMP]
FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
NOV 17 2009
MICHAEL S. RICHIE
CLERK

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

* * *

105,451 WILBANKS SECURITIES, INC., Plaintiff/Appellant, v. DONALD R. MCFARLAND, Defendant/Appellee.

Appellant's Petition for Rehearing is Denied.

* * *

SO ORDERED this 16th day of November, 2009. ALL JUDGES CONCUR.

/s/_____
DEBORAH B. BARNES
Presiding Judge, Division II

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

[DATE STAMP]
FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC – 7 2009
MICHAEL S. RICHIE
CLERK

WILBANKS SECURITIES
Plaintiff/Appellant

vs. Appeal No. 105,451

DONALD R. McFARLAND
Defendant/Appellee

PETITION FOR WRIT OF CERTIORARI

Appellant, Wilbanks Securities, Inc., ("Wilbanks Securities"), hereby respectfully files this Petition for Writ of Certiorari to review the October 8, 2009 decision of the Court of Appeals (attached hereto) and its November 17, 2009, Order Denying Rehearing. Pursuant to Okla. Sup. Ct. R. 1.179, the Appellees would show the Court as follows:

1. The Court of Civil Appeals, Division II, issued its Opinion on October 8, 2009. (Exhibit A) A Petition for Rehearing was filed on October 28,

2009. The Petition for Rehearing was denied on November 17, 2009.

2. The Court should grant the Petition for Writ of Certiorari because the Court of Appeals has decided a question of substance in a way not in accord with the applicable decisions of this Court and because the decision so departs from the accepted and usual course of judicial proceedings as to call for this Court's supervision.

I. *Brief Statement of Facts*

Wilbanks Securities, Inc., ("Wilbanks"), is an Oklahoma Corporation engaged in the financial investment industry as a registered broker dealer and member of the National Association of Securities Dealers (NASD now FINRA). R. 283, R. 420. Donald R. McFarland ("McFarland") is a licensed insurance agent and "Series 6" registered securities representative who worked as an independent contractor for Wilbanks, until his termination. *Id.* Following McFarland's termination, Wilbanks filed an NASD arbitration claim against McFarland on November 24, 2004, asserting claims of breach of contract, breach of the duty of good faith, "selling away," tortious interference with business, and fraud. R. 421, R. 328. McFarland responded by asserting counterclaims for defamation, wrongful confiscation of commissions and wrongful imposition of a $20,000 fine. R. 421, R. 329. Based upon the evidence allowed in the arbitration, the

arbitration panel denied Wilbanks' claims and found it liable to McFarland for withheld commissions, future renewals, a $20,000 fine imposed against McFarland (but unpaid by him), together with costs and attorney's fees. *Id.* The Arbitration award was entered on May 18, 2006. R. 328-336.

On June 16, 2006, Wilbanks filed a Petition to Vacate or Modify Arbitration Award in the Oklahoma County District Court, State of Oklahoma. R. 1-21. Vacating an arbitration award is a remedy allowed under *Oklahoma's Uniform Arbitration Act*, 12 O.S. § 1874, or under the *United States Arbitration Act*, 9 U.S.C. § 10. Indeed, Oklahoma's statute generally mirrors the federal statute. With leave of the court, Wilbanks' filed its Second Amended Petition to Vacate or Modify Arbitration Award on April 6, 2007. R. 283-288. Specifically, Wilbanks' Second Amended Petition to Vacate Arbitration Award asserts five separate grounds warranting vacating the NASD arbitration award, to include: (i) manifest disregard of the law (in violation of the parties' arbitration agreement) by not applying the clear terms of the parties' agreement and McFarland's testimonial admission of "selling away," (ii) exceeding the arbitrator's powers by fulfilling their duties in an arbitrary and capricious manner, (iii) failure of the arbitrator(s) to disclose information, as required, which may evidence a bias or a conflict between the arbitrator(s) and Wilbanks, (iv) failure to postpone the arbitration as reasonably and properly requested by Wilbanks, and also, (v) the arbitrators' refusal to allow Wilbanks to present all its witnesses

and evidence. R.285-287.

On June 1, 2007, the Defendant filed his Motion for Summary Judgment. R. 291400. The Defendant's Motion for Summary Judgment does not contain a "Statement of Undisputed Facts" section. *Id.* In his Motion for Summary Judgment, McFarland argued that, (i) Wilbanks cannot prove its claim to its high burden of proof because certain parts of the arbitration record have *yet* to be submitted to the trial court, (ii) that Wilbanks' evidence of arbitrator partiality is insufficient or unpersuasive, (iii) that even if the arbitrators did manifestly ignore Oklahoma law in their decision, that *"most likely"* is was proper for them to do so, (iv) that Wilbanks' Second Amended Petition is deficient because it does not cite to the arbitration transcript to support its positions, (v) that Wilbanks' claims of improper exclusion of its evidence did not impact the outcome of the case, because "it was the testimony of Aaron Wilbanks, which was largely an unbroken diatribe, [that] created the impression that led to the Award by the NASD panel," (vi) that the arbitrators properly denied Wilbanks' motion to postpone the hearing because Wilbanks failed to prove it would be prejudiced otherwise, and finally, (vii) that summary judgment should be granted to McFarland because Aaron Wilbanks (principal of Wilbanks Securities, Inc.) is a vexatious litigant, albeit not declared so by any Court. R. 295-315.

In order to present additional evidence in support of its Response to the Defendant's Motion for

Summary Judgment, Wilbanks sought to take the deposition of three key witnesses, including two witnesses who could testify on the specific issue of arbitrator bias. R. 404. Immediately thereafter, McFarland filed a Motion to Quash, which the district court granted finding that Wilbanks was *"not entitled"* to any discovery in the action. R. 435-436. The trial court ordered Wilbanks to respond to Defendant's Motion for Summary Judgment, without conducting any discovery, by September 28, 2007. *Id.*

On September 28, 2007, Wilbanks filed its Response to Defendant's Motion for Summary Judgment. R. 411-428. Wilbanks asserted that, (i) McFarland's Motion for Summary Judgment was improper because it did not set forth any "Statement of Material Facts" or otherwise cite supporting evidence as required by Rule 13, Rules for District Courts, (ii) that McFarland's Motion fails to recognize that Plaintiff has a valid cause of action to seek the vacating of an arbitration award on the grounds set forth in the Oklahoma Uniform Arbitration Act, and (iii) that, in fact, the Plaintiff's Petition to Vacate Arbitration Award properly alleges statutory grounds to vacate the NASD arbitration award obtained by McFarland. R. 411-427.

The Defendant McFarland filed his Reply in Support of Motion for Summary Judgment on October 5, 2007. Therein McFarland admits the deficiency of his Motion for Summary Judgment with the following:

> Wilbanks argued in Plaintiff s Response to Motion for Summary Judgment ("Wilbank's [sic] Response Brief") in "Proposition I" that Mr. McFarland's Motion for Summary Judgment was defective because it failed to precisely follow the formula in District Court Rule 13. The parties can agree on that much. R. 429.

The Defendant's Motion for Summary Judgment was set for hearing on October 26, 2007. At the hearing, the Court announced that it had read the pleadings, that it would not accept further oral argument, and that the Court was prepared to rule. In its ruling, the Court stated as follows:

> THE COURT: The Court finds that – I am going to consider the Defendant's Motion for Summary Judgment, in essence, [as] Defendant's Motion to Confirm Arbitration Award. That motion is hereby sustained. Defendant will prepare the appropriate order, present it to me within ten days. I think that addresses all the issues presented to the Court here today. Anything else I need to address, Mr. Heggy? R. 449, Tr. p. 4, ll 5-17.

On November 16, 2007, Wilbanks filed its Motion for New Trial. R. 439-444. McFarland did not

ever respond to the Plaintiff's Motion for New Trial. R. 477-485. On December 13, 2007, the district court denied Wilbanks' Motion for New Trial. R. 445-448. The trial court's Judgment of December 13, 2007, further grants McFarland an award of attorney's fees in the amount of $24,020.75. *Id.*

On October 8, 2008, in an Opinion released for publication, the Oklahoma Court of Appeals affirmed the trial court's Judgment of November 16, 2007. In affirming, the Court reasoned that an application or motion in the context of this case, *"is not entitled to the same procedural due process that a § 2003 petition would receive." See* Opinion, ¶13. In finding that the Appellant was not entitled to minimum due process *(i.e.,* reasonable advance notice and a fair opportunity to be heard) in the context of reviewing an arbitration award, the Court of Appeals' Opinion cites and relies upon *Health Services Management Corp. v. Hughes,* 975 F.2d 1253 (7th Cir. 1992), a case not cited by either party in their briefs. Opinion, ¶ 22-24. What due process, if any, is owed in a proceeding brought under *Oklahoma's Uniform Arbitration Act,* 12 O.S. § 1874, is a matter of first impression under Oklahoma law. The Court of Appeals incorrectly determined that no "due process" is due to a party seeking relief under 12 O.S. § 1874.

II. *The basis of the Court of Appeals' Opinion is legally incorrect – minimum due process is required even in a challenge brought under Oklahoma's Uniform Arbitration Act.*

The Court of Appeals in its Opinion admittedly considered an issue of first impression under Oklahoma law, that being what due process, if any, is owed in a proceeding brought under *Oklahoma's Uniform Arbitration Act*, 12 O.S. § 1874. *See* Opinion, ¶ 16 ([Wilbanks'] "assertions of error give rise to the question of what due process is due when an arbitration award is challenged under the grounds set forth in § 1874.") The Court of Appeal reasoned that a post arbitration award proceeding brought in an Oklahoma Court under 12 O.S. § 1874, is fundamentally an arbitration proceeding and not a court proceeding, thus, the Oklahoma Pleading Code is inapplicable. *See* Opinion, ¶ 24, footnote 17. The Appellant respectfully maintains that the Oklahoma Court of Appeals got it wrong.

The Appellant requests a Writ of Certiorari on the basis that procedural due process is (or should be) a requirement for any and all court action, to include for the determination of motions. *See Corman v. H-30 Drilling, Inc.*, 2001 OK 92, ¶ 11-13, 40 P.3d 1051 (9-0 decision vacating Court of Appeals Opinion affirming Judgment; the Appellant was denied due process on the presentation of a motion for summary judgment); *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, ¶ 12, 598 P.2d 659 (Okla. 1979) (evidentiary hearing held to determine disputed motion for attorney fees), *United States v. Hardage*, 982 F.2d 1491, 1496 (10th Cir. 1993) (Where material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary

hearing on motion to enforce settlement agreement) *[citing* case law from 4th, 5th, 6th, 8th, 9th and D.C. Circuits]. Here, the Appellant asserts that a proceeding under 12 O.S. § 1874 (whether classified "petition, motion or application"), is a court proceeding, for which minimum due process is proper.

Applying the "Supreme Law of the Land" in all State Court proceedings (including those which involve arbitrations awards), will not unreasonably frustrate "the ostensible purpose for resort to arbitration..." *Cf.,* Opinion, ¶ 24. This is true because the purpose of arbitration is not to quickly reach determinations which "manifestly disregard the law" or which are the result of "arbitrator bias." Allowing minimum due process in post arbitration award proceedings does not defeat the purpose of arbitration given the very narrow review allowed and high burden required by 12 O.S. § 1874. Contrary to the Court of Appeals analysis, nothing in Oklahoma's Uniform Arbitration Act suggests that minimum due process can or should be denied in court proceedings brought thereunder; it is doubtful that the Oklahoma Legislature would have passed the protections and remedies afforded by the Oklahoma Uniform Arbitration Act if such protections were not available through court proceedings with minimum due process.

Clearly minimum due process is a Constitutional requirement, the *"supreme law of the land"* should trump any law or analysis which would otherwise abate its basic requirements, including a

general argument that review of arbitration awards is severely limited. While it is undisputed that *in the trial of their claims* the parties in arbitration trade "the procedure and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration," the fact is they more willingly do so because they know that both state and federal statutes allow for a limited review of such awards for fraud, corruption, gross legal error, *etc. Cf,* Opinion, ¶ 25. If due process rights are not afforded in such statutory authorized reviews, then such *"would defeat the purpose"* of the *statutory authorized review* and could very well have a chilling effect on the willingness of people to arbitrate their claims. *Cf,* Opinion, ¶ 24. Respectfully, constitutional requirements should not be bent or broken in deference to the finality of arbitration, especially when the law allows for the review of arbitration awards on certain narrow grounds and the parties themselves know such rights for narrow review exist. In a state court review of an arbitration award authorized by statute, Constitutional due process is proper.

The Court of Appeals' analysis that Wilbanks failed to provide a complete record of the arbitration proceeding to the trial court or on appeal is flawed (Opinion, ¶¶ 37-40), because at no time was Wilbanks told that it had to submit same or face summary adjudication. Under notice pleading, proof of a claim is not required with the filing. Rather, claims must be proven at the time of trial (or evidentiary hearing), unless a proper Motion for Summary Judgment if filed.

Wilbanks Securities should not lose on appeal for having an insufficient record, where the trial court never warned Wilbanks that it would *summarily* determine the claim unless such was provided.

Finally, even if the Opinion as written is determined correct, the Appellant requests that such be given a prospective effect only. Here, the Appellant was caught in an unknown and unforeseeable "procedural trap." The contours of what due process, if any, is owed in a review of an arbitration award was not clearly set forth in Oklahoma law or any prior Oklahoma court decisions. Indeed, such may be why the Court of Appeals released its Opinion for publication. Here, the Appellant reasonably relied upon the fact that McFarland filed a "motion for summary judgment" that was admittedly deficient. The Appellant did not know that it had to fully argue the merits of its case to the trial court – and could not just rely on the obvious procedural arguments. Here, the Appellant was under the circumstances denied a fair opportunity to present its most persuasive case. In this circumstance, the Court should give its ruling "prospective effect" only so that an injustice is avoided. The Oklahoma Supreme Court has approved of this practice in the past. *See Manning* v. *State ex rel Dept. of Public Safety,* 1994 OK 62, ¶ 12, 876 P.2d 667, 673.

CONCLUSION

For the legal and factual reasons set forth herein, this Court should VACATE the Court of

Appeals' Opinion of October 8, 2009, and REVERSE the Trial Court's Journal Entry of Judgment.

Respectfully submitted,

/s/ _____

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Oklahoma City, Oklahoma 73103
(405) 943-9693
(405) 232-1108 facsimile

ATTORNEY FOR WILBANKS SECURITIES, INC.

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of December, 2009, a true and correct copy of the above and foregoing APPELLANT'S PETITION FOR CERTIORARI has been mailed, first class mail, postage prepaid, to the parties listed below.

Rodney J. Heggy, Esq.
Heggy & Associates, LLC
10205 North Pennsylvania Ave
Oklahoma City, OK 73120

/s/
Andrew J. Waldron

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

[DATE STAMP]
FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
OCT 28 2009
MICHAEL S. RICHIE
CLERK

WILBANKS SECURITIES, INC.
Plaintiff/Appellant

vs. Appeal No. 105,451

DONALD R. McFARLAND
Defendant/Appellee

APPELLANT'S PETITION FOR REHEARING

COMES NOW the Appellant, Wilbanks Securities, Inc., and hereby files this Petition for Rehearing. On October 8, 2008, in an Opinion released for publication, the Oklahoma Court of Appeals affirmed the trial court's Judgment of November 16, 2007. In affirming the Judgment, the Court reasoned that an application or motion in the context of this case, *"is not entitled to the same procedural due process that a § 2003 petition would receive."* Opinion, ¶13. In finding that the Appellant was not denied due process *(i.e.,* reasonable advance notice and a fair

opportunity to be heard) in the context of reviewing an arbitration award, the Court of Appeals' Opinion cites and relies upon *Health Services Management Corp.* v. *Hughes,* 975 F.2d 1253 (7th Cir. 1992), a case not cited by either party in their briefs. Opinion, ¶ 22-24. The Appellant respectfully requests rehearing on the basis that procedural due process is (or should be) a requirement for any and all court action, to include for the determination of motions. *See Corman* v. *H-30 Drilling, Inc.,* 2001 OK 92, ¶ 11-13, 40 P.3d 1051 (9-0 decision vacating Court of Appeals Opinion affirming Judgment; the Appellant was denied due process on the presentation of a motion for summary judgment); *State ex rel. Burk v. City of Oklahoma City,* 1979 OK 115, ¶ 12, 598 P.2d 659 (Okla. 1979) (evidentiary hearing held to determine disputed motion for attorney fees), *United States v. Hardage,* 982 F.2d 1491, 1496 (10th Cir. 1993) (Where material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing on motion to enforce settlement agreement) *[citing* case law from 4th, 5th, 6th, 8th, 9th and D.C. Circuits].

Clearly, due process is a Constitutional requirement, the *"supreme law of the land"* should trump any law or analysis which would otherwise abate its basic requirements, including a general argument that review of arbitration awards is severely limited. While it is undisputed that *in the trial of their claims* the parties in arbitration trade "the procedure and opportunity for review of the courtroom for the

simplicity, informality and expedition of arbitration," the fact is they more willingly do so because they know that both state and federal statutes allow for a limited review of such awards for fraud, corruption, gross legal error, *etc. C.f.,* Opinion, ¶ 25. If due process rights are not afforded in such statutory authorized reviews, then such *"would defeat the purpose"* of the statutory authorized review and could very well have a chilling effect on the willingness of people to arbitrate their claims. *C.f.,* Opinion, ¶ 24. Respectfully, constitutional requirements should not be bent or broken in deference to the finality of arbitration, especially when the law allows for the review of arbitration awards on certain narrow grounds and the parties themselves know such rights for narrow review exist. In a state court review of an arbitration award authorized by statute, Constitutional due process is proper.

Finally, even if the Opinion as written is determined correct, the Appellant requests that such be given a prospective effect only. Here, the Appellant was caught in an unknown and unforeseeable "procedural trap." The contours of what due process, if any, is owed in a review of an arbitration award was not clearly set forth in Oklahoma law or any prior Oklahoma court decisions. Indeed, such may be why the Court of Appeals released its Opinion for publication. Here, the Appellant reasonably relied upon the fact that McFarland filed a "motion for summary judgment" that was admittedly deficient. The Appellant did not know that it had to fully argue the merits of its case to the trial court – and could not

just rely on the obvious procedural arguments. Here, the Appellant was under the circumstances denied a fair opportunity to present its most persuasive case. In this circumstance, the Court should give its ruling "prospective effect" only so that an injustice is avoided. The Oklahoma Supreme Court has approved of this practice in the past. *See Manning v. State ex rel Dept. of Public Safety,* 1994 OK 62, ¶ 12, 876 P.2d 667,673.

Respectfully submitted

*/s/*_____

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CERTIFICATE OF SERVICE

This is to certify that on this 28th day of October, 2009, a true and correct copy of the above and foregoing APPELLANT'S PETITION FOR REHEARING has been mailed, first class mail, postage prepaid, to the parties listed below.

Rodney J. Heggy, Esq.
Heggy & Associates, LLC
10205 North Pennsylvania Ave
Oklahoma City, OK 73120

/s/
Andrew J. Waldron

DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[DATE STAMP]
FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
NOV 15 2007
PATRICIA PRESLEY, COURT CLERK
by _____
Deputy

WILBANKS SECURITIES, INC.,
Plaintiff,

vs. Case No. CJ-2006-5002

DONALD R. MCFARLAND,

PLAINTIFF'S MOTION FOR NEW TRIAL

COMES NOW the Plaintiff and respectfully files this Motion for New Trial. In support of its Motion, the Plaintiff set forth the following:

STATEMENT OF THE CASE AND FACTS

On June 16, 2006, the Plaintiff, through previous counsel filed its Petition to Vacate or Modify the Arbitration Award. The Petition Was filed in response to an Award that was issued in favor of the Defendant by a National Association of Securities Dealers' Arbitration Panel after hearings were held on

April 11, 12, and 13, 2006. On June 28, 2006, the Defendant removed the case to federal court in the United States District Court for the Western District of Oklahoma. Subsequently, on November 1, 2006, the federal court issued its Order remanding the case back to this Court.

On November 16, 2006, the Defendant filed a Motion to Dismiss. The Plaintiff filed its Response on December 12, 2006 and the Defendant Replied on February 12, 2007. Thereafter, on March 1, 2007, this Court sustained the Defendant's Motion to Dismiss and the Plaintiff was granted leave to file an Amended Petition. Plaintiff's First Amended Petition was filed March 30, 2007 and a Second Amended Petition was filed April 6, 2007.

On June 1, 2007, the Defendant filed a Motion for Summary Judgment. In preparation for their Response to the Motion for Summary Judgment and as part of their litigation of the case, the Plaintiff attempted to conduct discovery. On August 30, 2007, this Court issued its Order finding that the Plaintiff was not entitled to conduct discovery. Thereafter, on September 28, 2007, the Plaintiff filed its Response to the Motion for Summary Judgment. The Defendant filed a Reply on October 5, 2007 and a hearing was scheduled for October 26, 2007.

At the hearing on the Defendant's Motion for Summary Judgment, the Court announced that it would rule without hearing further argument. On its

own Motion, the Court then found that the Defendant's Motion for Summary Judgment should be "converted" into a "Motion to Confirm the Arbitrator's Award". The Court then issued its Order granting the newly designated Motion. The written Order memorializing this Court's ruling was filed on November 6, 2007. It is from these adverse Orders that the Plaintiff respectfully files this Motion for New Trial.

PROPOSITION I

THE PLAINTIFF IS ENTITLED TO A NEW TRIAL PURSUANT TO 12 O.S. § 651 (1), (6), AND (7), BECAUSE THE PLAINTIFF WAS PREVENTED FROM HAVING A FAIR TRIAL

After the Defendant filed a Motion for Summary Judgment and in the normal course of litigating its case, the Plaintiff attempted to begin discovery. The Defendant filed a Motion to Quash a Notice of Deposition that the Plaintiff had issued and the matter was set for hearing before the Court. At the hearing, this Court issued its Order finding that the Plaintiff was not entitled to conduct discovery in these proceedings.

The Plaintiff submits that the Court's Order denying discovery was arbitrary and not founded in any statutory or case law. The Plaintiff asserts that the Court's Order was "irregular" and/or an "abuse of discretion" by which the Plaintiff "was prevented from

having a fair trial". 12 O.S. § 651(1), (6), and (7). Therefore, pursuant to 12 O.S. § 651(1), (6), and (7), the Plaintiff is entitled to a new trial and respectfully requests the same.

PROPOSITION II

THE PLAINTIFF IS ENTITLED TO A NEW TRIAL PURSUANT TO 12 O.S. § 651 (1), (6) AND (7), BECAUSE THE COURT'S RULING ON THE MOTION FOR SUMMARY JUDGMENT WAS CONTRARY TO LAW.

A cursory review of the Defendant's Motion for Summary Judgment quickly reveals that the Motion wholly fails to comply with Rule 13. The Plaintiff filed a Response and Objection to the Motion and carefully and thoughtfully explained to the Court in detail why the Plaintiff's Motion must obviously fail, both procedurally and legally. Plaintiffs counsel was likewise prepared to present any further oral argument which might be necessary at the hearing on the matter. When the matter came on for hearing, the Court did not permit any further argument from the parties.

Instead, in a stunning development of events, the Court announced that she was "converting" the Defendant's Motion for Summary Judgment into a "Motion to Confirm the Arbitration Award". The Court "converted" the Motion solely on her own accord and not at the request of either party. Even after the Court

announced the unanticipated "conversion", she failed to permit any further argument from the parties. The Court then summarily sustained the newly converted "Motion to Confirm the Arbitration Award".

The Plaintiff submits that the Court had no legal standing or basis for entering her own "conversion" of the Defendant's Pleading. Furthermore, even if the Defendant had requested the "conversion", which he never did, there is no legal authority or basis for a "Motion to Confirm the Arbitration Award". If the Court was considering inventing such a fictional Motion, the Plaintiff submits that minimum due process required that the Court should have, at the least, given the Plaintiff notice of her intentions and an opportunity to either respond orally and/or in writing. As a result, the Plaintiff respectfully submits that it is entitled to a new trial pursuant to 12 O.S. § 651 (1), (6) and (7), because the Court's actions and decision were "contrary to law" and an "error of law".

CONCLUSION

As set forth above, the Plaintiff is entitled to a new trial pursuant to 12 O.S. § 651 (1), (6) and (7). By denying the Plaintiff the right to conduct discovery and then by improperly converting a Motion for Summary Judgment into a Motion to Confirm the Arbitration Award, this Court "materially affected the substantial rights" of the Plaintiff, prevented the Plaintiff "from having a fair trial" and committed

"error" that is "contrary to law". As such, the Plaintiff respectfully requests that this Court grant its Motion for New Trial.

Respectfully submitted,

WILKINSON • MCAMIS LAW FIRM

By: s/Bill Wilkinson
Bill V. Wilkinson, OBA No. 9621
Sarah B. McAmis, OBA No. 15903
WILKINSON • MCAMIS LAW FIRM
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Tulsa, Oklahoma 74145-7857
Tel: 918-663-2252; Fax: 918-663-2254
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on the 15th day of November, 2007, I caused a true and correct copy of the foregoing to be sent by facsimile transmission and U.S. Mail with proper postage fully prepaid thereon, to:

Rodney J. Heggy, Esq.
Heggy & Associates, LLC
2716W First National Center
120 North Robinson
Oklahoma City OK 73102

s/ Bill Wilkinson
Bill V. Wilkinson

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 38B - Uniform Arbitration Act

Section 1874 - Motion to Vacate Award - Timing - Rehearing

Cite as: O.S. §,__

A. Upon an application and motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

1. The award was procured by corruption, fraud, or other undue means;

2. There was:

a. evident partiality by an arbitrator appointed as a neutral arbitrator,

b. corruption by an arbitrator, or

c. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

3. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 6 of this act, so as to prejudice substantially the rights of a party to the arbitration proceeding;

4. An arbitrator exceeded the arbitrator's powers;

5. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection C of Section 16 of this act not later than the beginning of the arbitration hearing; or

6. the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 of this act so as to prejudice substantially the rights of a party to the arbitration proceeding.

B. An application and motion under this section must be filed within ninety (90) days after the movant receives notice of the award pursuant to Section 20 of this act or within ninety (90) days after the movant receives notice of a modified or corrected award pursuant to Section 21 of this act, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within ninety (90) days after the ground is known or by the exercise of reasonable care would have been known by the movant.

C. If the court vacates an award on a ground other than that set forth in paragraph 5 of subsection A of this section, it may order a rehearing. If the award is vacated on a ground stated in paragraph 1 or 2 of subsection A of this section, the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in paragraph 3, 4 or 6 of subsection A of this subsection, the rehearing may be before the arbitrator who made the award or the arbitrator's

successor. The arbitrator must render the decision in the rehearing within the same time as that provided in subsection B of Section 20 of this act for an award.

D. If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

WILBANKS SECURITIES INC., an
Oklahoma Corporation,
Plaintiff,

vs. CJ-2006-5002

DONALD RAY McFARLAND, an Individual,
Defendant.

SEVENTH JUDICIAL DISTRICT OF OKLAHOMA
TRANSCRIPT OF PROCEEDINGS HAD ON THE
26TH DAY OF OCTOBER, 2007

BEFORE THE HONORABLE
VICKI L. ROBERTSON
DISTRICT JUDGE

Reported by:

Deborah J. Torbert, CSR
Official Court Reporter
321 W. Park, Room 315
Oklahoma City, Oklahoma 73102
(405) 731-1406

DISTRICT COURT OF OKLAHOMA –
OFFICIAL TRANSCRIPT

APPEARANCES:

FOR THE PLAINTIFF:

MS. SARAH McAMIS
Wilkinson-McAmis
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Bancfirst Building, Fourth Floor
7625 East 51st Street
Tulsa, Oklahoma 74145-7857

FOR THE DEFENDANT:

MR. RODNEY JOE HEGGY
Heggy & Associates, LLC
Attorneys at Law
10205 North Pennsylvania Avenue
Oklahoma City, Oklahoma 73120

THE COURT: Let us go on the record in the case of CJ-2006-5002, the case styled Wilbanks Securities, Incorporated, versus Donald McFarland.

State your appearances on the record, first of all, on behalf of the Plaintiff.

MS. McAMIS: Sarah McAmis on behalf of the Plaintiff, Your Honor.

THE COURT: Defendant?

MR. HEGGY: Rod Heggy for Don McFarland.

THE COURT: Thank you, counselors. Case comes on today pursuant to Defendant's Motion for Summary Judgment.

The Court has received and read and reviewed the following documents: The Defendant's Motion for Summary Judgment, all of these with briefs and numerous exhibits attached; Plaintiff's Response to same; Defendant's Reply. In addition, the Court has been furnished a transcript arbitration hearing held on April 11, 12, and 13 of 2006.

Mr. Heggy, is that the complete set of documents the Court has to review for today's hearing?

MR. HEGGY: That is all the documents the Court has.

THE COURT: Okay. And Ms. McAmis, you agree as well?

MS. McAMIS: I agree, Your Honor.

THE COURT: Very good. Thank you. The Court has thoroughly read these documents. I had read some of them before the last time we met and is prepared to rule at this time. Based upon the pleadings, has no need for any additional oral argument.

The Court finds that – I am going to consider the Defendant's Motion for Summary Judgment, in essence, Defendant's Motion to Confirm the Arbitration Award. That motion is hereby sustained.

Defendant will prepare the appropriate order, present it to me within ten days. I think that addresses all the issues presented to the Court here today.

Anything else I need to address, Mr. Heggy?

MR. HEGGY; Not on behalf of the Defendant.

THE COURT: Ms. McAmis?

MS. McAMIS: Just for the purposes of the record, please note our exception.

THE COURT: You certainly may.

* * *

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

WILBANKS SECURITIES INC., an
Oklahoma Corporation,
Plaintiff,

vs. Case No. CJ-2006-5002

DONALD RAY McFARLAND, an Individual,
Defendant.

CERTIFICATE OF COURT REPORTER

I, Deborah J. Torbert, Certified Shorthand Reporter and Official Court Reporter for the State of Oklahoma, do certify that the foregoing transcript in the above-styled case is a true, correct and complete transcript of my shorthand notes of the hearing in said cause.

IN WITNESS WHEREOF, I hereunto set my hand and official seal this 28th day of December, 2007.

Deborah J. Torbert, CSR
Official Court Reporter